AK Kontraktor Sdn Bhd v State Government of Sabah & Anor

HIGH COURT (KOTA KINABALU) — APPLICATION FOR JUDICIAL REVIEW NO BKI-25–20/7 OF 2022 (HC5)
AMELATI PARNELL JC
27 JANUARY 2023

Administrative law — Judicial review — Certiorari — One year after appointing contractor to carry out road maintenance and upgrading works in East Sabah, State Government terminated contract purportedly on ground of national interest, national policy or national security — Whether evidence showed none of those considerations applied in decision to terminate as new contractor was promptly appointed to take over terminated contractor's contract — Whether decision to terminate was wrong in law, made in bad faith and with ulterior motive and improper purpose — Whether decision to terminate was also unconstitutional for breaching art 8 of Federal Constitution, irrational and arbitrary and breached rules of natural justice and procedural impropriety as contractor was never told real reason for termination or given opportunity to be heard

The first respondent ('R1') acting through its servant and employee, the second respondent ('R2'), who was Sabah's public works department director, awarded to the applicant in January 2020, a contract to carry out routine maintenance and upgrading works on roads under the jurisdiction of district councils and municipal councils in the East Coast region of Sabah ('the contract'). About a year into the contract, the applicant complained of attempts by R1, through R2, to pressure it into giving up the contract, eg: (a) by suggesting that the applicant consider agreeing to a mutual termination of the contract because of reduction in government funding for the year 2021; (b) reducing the contract sum from RM325m to slightly more than RM210m by removing 'routine maintenance works' from the applicant's scope of works and awarding the same, as instructed by the Ministry of Finance Sabah ('MOF'), to another contractor; and (c) informing the applicant that no government funding had been allocated for the applicant's contract for the year 2022. The applicant said that at all material times it did not receive any warning or notice from the respondents that it had committed any breach of the contract. On 5 April 2022, the applicant received a letter dated 31 March 2022 from R2 informing that R1 had decided to terminate the contract from 1 May 2022 pursuant to cl 52.1 of the conditions of contract. That clause permitted R1 to terminate the contract (without assigning any reason) if it considered the termination 'necessary for national interest, national policy or national security'. The letter to the applicant, however, did not state any specific ground for the termination. Two months after it received the termination letter, the applicant discovered that MOF had instructed R2 to appoint a new contractor to carry out the road

maintenance works which were formerly under the applicant's contract. The applicant obtained leave of court to file the instant judicial review application to declare the termination of its contract invalid and null and void and to quash the same. The respondents opposed the application on the ground that the dispute between themselves and the applicant was not amenable to judicial review as the same was a private commercial contract not involving any element of public law or breach of the respondents' public duties. As for questions concerning government funding and the decision to award to other contractors works which were formerly part of the applicant's contract, the respondents said they were matters which were protected under the Official Secrets Act 1972.

Held, allowing the judicial review application:

(1) The test to determine the proper procedure to be adopted was to ascertain whether there was a public law element in the dispute. If the claim was based solely on public law, then it must be commenced by way of O 53 of the Rules of Court 2012. If it was a mixture of public and private law and the public law element was predominant, again it must be commenced by way of O 53 (see para 32).

(2) The respondents had a statutory public duty and function to maintain the good condition of all state roads in Sabah and R1's contract with the applicant was made in the exercise of its statutory power in the discharge of that public duty and function. The element of public law was therefore present in the contract to attract the remedies under administrative law. The applicant's complaint or grievance in relation to the contract was therefore amenable to judicial review (see paras 44–46 & 51).

(3) The court found no evidence to suggest that R1's termination of the applicant's contract was based on considerations of national interest, national policy or national security. In failing to prove that the interest, policy or security of the nation was the basis for terminating the applicant's contract, R1's reliance upon cl 52.1 to terminate the contract was wholly misconceived and wrong in law and made in bad faith with ulterior motive and improper purpose. R1 had acted in excess of its jurisdiction and consequently, the decision to terminate was invalid and null and void. The termination of the contract offended the most basic and explicit principles of justice and fairness and was injurious to public interest and public policy (see paras 77–78, 80, 91–92 & 97).

(4) R1's termination of the applicant's contract was not only unconstitutional for being contrary to art 8 of the Federal Constitution, in that R1 had acted in a discriminatory manner against the applicant, but was also irrational, manifestly unreasonable, capricious and arbitrary. There was also a breach of natural justice and procedural impropriety as

the applicant was not notified of the real reason for the termination or given an opportunity to be heard (see paras 82–84 & 87).

(5) There was no basis for the respondents to rely upon the Official Secrets Act 1972 ('the OSA'). Exhibits AK9 and AK12 which the applicant relied upon to support its application were merely inter-departmental administrative letters informing the recipients about the appointment of contractor and were not documents specified in the Schedule under s 2 of the OSA, nor were those two documents classified as 'official secret'. The mere assertion of confidentiality and that affairs of State were involved without evidence in support thereof could not shut out relevant evidence (see paras 62–65 & 58).

[Bahasa Malaysia summary

Responden pertama ('R1') yang bertindak melalui penjawat dan pekerjanya, responden kedua ('R2'), yang merupakan pengarah jabatan kerja awam Sabah, telah memberikan award kepada pemohon pada Januari 2020, satu kontrak untuk menjalankan kerja-kerja penyelenggaraan dan naik taraf rutin di jalan raya di bawah bidang kuasa majlis daerah dan majlis perbandaran di wilayah Pantai Timur Sabah ('kontrak tersebut'). Kira-kira setahun selepas kontrak, pemohon mengadu tentang percubaan oleh R1, melalui R2, untuk menekannya supaya melepaskan kontrak, iaitu: (a) dengan mencadangkan supaya pemohon mempertimbangkan untuk bersetuju dengan penamatan kontrak bersama kerana pengurangan pembiayaan kerajaan bagi tahun 2021; (b) mengurangkan jumlah kontrak daripada RM325 juta kepada lebih sedikit daripada RM210 juta dengan mengalihkan 'kerja penyelenggaraan rutin' daripada skop kerja pemohon dan memberikan award yang sama, seperti yang diarahkan oleh Kementerian Kewangan Sabah ('KKS'), kepada kontraktor lain; dan (c) memaklumkan pemohon bahawa tiada pembiayaan kerajaan telah diperuntukkan untuk kontrak pemohon bagi tahun 2022. Pemohon mengatakan bahawa pada setiap masa yang material ia tidak menerima sebarang amaran atau notis daripada responden bahawa ia telah melakukan sebarang pelanggaran kontrak. Pada 5 April 2022, pemohon menerima surat bertarikh 31 Mac 2022 daripada R2 memaklumkan bahawa R1 telah memutuskan untuk menamatkan kontrak mulai 1 Mei 2022 menurut klausa 52.1 syarat kontrak tersebut. Klausa tersebut membenarkan R1 untuk menamatkan kontrak (tanpa memberikan sebarang alasan) jika ia menganggap penamatan tersebut 'adalah perlu untuk kepentingan negara, dasar negara atau keselamatan negara'. Surat kepada pemohon, bagaimanapun, tidak menyatakan sebarang alasan khusus untuk penamatan tersebut. Dua bulan selepas ia menerima surat penamatan, pemohon mendapati KKS telah mengarahkan R2 untuk melantik kontraktor baharu untuk menjalankan kerja-kerja penyelenggaraan jalan yang dahulunya di bawah kontrak pemohon. Pemohon mendapat kebenaran mahkamah untuk memfailkan permohonan semakan kehakiman semasa untuk mengisytiharkan penamatan kontraknya

tidak sah dan terbatal serta membatalkannya. Responden menentang permohonan tersebut atas alasan bahawa pertikaian antara mereka dan pemohon tidak boleh dipinda melalui semakan kehakiman kerana perkara yang sama adalah kontrak komersial swasta yang tidak melibatkan sebarang unsur undang-undang awam atau pelanggaran kewajipan awam responden. Bagi soalan mengenai pembiayaan kerajaan dan keputusan untuk memberika award kerja-kerja kontraktor lain yang dahulunya merupakan sebahagian daripada kontrak pemohon, responden berkata ia adalah perkara yang dilindungi di bawah Akta Rahsia Rasmi 1972.

Diputuskan, membenarkan permohonan semakan kehakiman:

(1) Ujian untuk menentukan prosedur yang betul untuk diterima pakai adalah untuk memastikan sama ada terdapat unsur undang-undang awam dalam pertikaian tersebut. Sekiranya tuntutan tersebut berdasarkan undang-undang awam semata-mata, maka ia mesti dimulakan melalui A 53 Kaedah-Kaedah Mahkamah 2012. Jika ia adalah campuran undang-undang awam dan swasta dan elemen undang-undang awam adalah utama, sekali lagi ia mesti dimulakan. melalui A 53 (lihat perenggan 32).

(2) Responden mempunyai kewajipan dan fungsi awam berkanun untuk mengekalkan keadaan baik semua jalan negeri di Sabah dan kontrak R1 dengan pemohon dibuat dalam menjalankan kuasa berkanunnya dalam melaksanakan tugas dan fungsi awam tersebut. Oleh itu, unsur undang-undang awam wujud dalam kontrak untuk mengguna pakai remedi di bawah undang-undang pentadbiran. Oleh itu, aduan atau rungutan pemohon berhubung dengan kontrak boleh dipinda melalui semakan kehakiman (lihat perenggan 44–46 & 51).

(3) Mahkamah tidak menemui keterangan untuk mencadangkan bahawa penamatan kontrak pemohon R1 adalah berdasarkan pertimbangan kepentingan negara, dasar negara atau keselamatan negara. Dalam kegagalan untuk membuktikan bahawa kepentingan, dasar atau keselamatan negara adalah asas untuk menamatkan kontrak pemohon, pergantungan R1 terhadap klausa 52.1 untuk menamatkan kontrak adalah salah arah dan salah di sisi undang-undang dan dibuat dengan niat jahat dengan motif tersembunyi dan tujuan yang tidak wajar. R1 telah bertindak melebihi bidang kuasanya dan akibatnya, keputusan untuk penamatan adalah tidak sah dan terbatal. Penamatan kontrak melanggar prinsip keadilan dan kesaksamaan yang paling asas dan jelas serta memudaratkan kepentingan awam dan dasar awam (lihat perenggan 77–78, 80, 91–92 & 97).

(4) Penamatan kontrak pemohon R1 bukan sahaja tidak berperlembagaan kerana bertentangan dengan perkara 8 Perlembagaan Persekutuan, kerana R1 telah bertindak secara diskriminasi terhadap pemohon, tetapi

juga tidak rasional, jelas nyata tidak munasabah, tiada ketetapan dan sewenang-wenangnya. Terdapat juga pelanggaran keadilan semula jadi dan ketidakwajaran prosedur kerana pemohon tidak dimaklumkan tentang alasan sebenar penamatan atau diberi peluang untuk didengari (lihat perenggan 82–84 & 87).

(5) Tiada asas untuk responden bergantung kepada Akta Rahsia Rasmi 1972 ('ARR'). Ekshibit AK9 dan AK12 yang menjadi sandaran pemohon untuk menyokong permohonannya hanyalah surat pentadbiran antara jabatan yang memaklumkan penerima tentang pelantikan kontraktor dan bukan dokumen yang dinyatakan dalam Jadual di bawah s 2 ARR, bahkan kedua-dua dokumen tersebut tidak diklasifikasikan sebagai 'rahsia rasmi'. Penegasan kerahsiaan semata-mata dan bahawa hal ehwal Negara terlibat tanpa bukti yang menyokongnya tidak dapat menutup keterangan yang berkaitan (lihat perenggan 62–65 & 58).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 1 MLRA 524; [2010] 5 CLJ 865, FC (folld)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307; [2010] 1 CLJ 300, FC (refd)

Dhaya Maju LTAT Sdn Bhd v Kerajaan Malaysia & Anor [2021] MLJU 1149, HC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

KAB Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal [2019] 6 MLJ 752, CA (refd)

Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd [2015] 2 MLJ 509, CA (refd)

Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243; [1982] 1 LNS 1, FC (refd)

Mohamad Alhamdu bin Zainuddin v ACP Khaw Kok Chin (Chairman, Disciplinary Board Briged Utara Pasukan Gerakan Am, PDRM, Ulu Kinta, Perak) & Ors [2017] 10 MLJ 161, HC (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449; [2002] 4 CLJ 309, FC (refd)

Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri [2018] 3 MLJ 14, CA (refd)

OSK & Partners Sdn v Tengku Noone Aziz & Anor [1983] 1 MLJ 179, FC (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765; [2014] 6 CLJ 541; [2014] 1 LNS 746, FC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (distd)

Legislation referred to

Constitution of the State of Sabah art 12(1)
Electricity Act 1990 s 38
Federal Constitution arts 8, 69(1), 109(b), Part II, Tenth Schedule, items 2, 4, 5
Government Contracts Act 1949 ss 3, 38(1), (3), 43, 53, 57(1)
Government Proceedings Act 1956 ss 4, 29, 29(1)(a)
Local Government Ordinance 1961 s 3
Official Secrets Act 1972 ss 2, 2B, 8(2)
Rules of Court 2012 O 53, O 53 rr 2(4), 3(2), (5), (6)
Specific Relief Act 1950 s 54

Kong Hong Ming @ Kong Fo Min (Lee & Kong) for the applicant.
Dayangku Noranisah Pengiran Hassanel (State Counsel, Sabah State Attorney-General's Chamber) for the respondent.

Amelati Parnell JC:

INTRODUCTION

[1] On 4 August 2022, this court granted leave to the applicant's application dated 4 July 2022 in encl 1 to apply judicial review for the following orders:

(a) a declaration that the decision of the first respondent to terminate Contract No 7/2020(S) awarded to the applicant pursuant to the letter of award dated 24 January 2020 for the works described as 'Penyelenggaraan Jalanraya-Jalanraya Majlis-Majlis Perbandaran Dan Daerah Di Kawasan Timur Sabah' is invalid, null and void;

(b) an order of certiorari to quash the decision of the first respondent to terminate Contract No 7/2020(S) awarded to the applicant pursuant to the letter of award dated 24 January 2020 for the works described as 'Penyelenggaraan Jalanraya-Jalanraya Majlis-Majlis Perbandaran Dan Daerah Di Kawasan Timur Sabah';

(c) damages to be assessed; and

(d) any further and/or other relief that this honourable court deems fit and proper to grant.

[2] In brief, this judicial review application is about the decision of the first and second respondents in terminating Contract No HQ.7/2020(S) (Penyelenggaraan Jalanraya-Jalanraya Majlis-Majlis Perbandaran dan Daerah di Kawasan Timur Sabah) ('the contract') through the letter of termination dated 31 March 2022.

[3] The cause papers filed by the parties are:

(a) statement pursuant to O 53 r 3(2) of the Rules of Court 2012 (encl 1);

(b) affidavit in support affirmed by Safineh bin Dato on 4 July 2022 (encl 2);

(c) corrective and supplementary affidavit of the applicant affirmed by Safineh bin Dato on 7 July 2022 (encl 3); and

(d) affidavit in support affirmed by Kamaludin bin Ag Abas on 7 July 2022 (encl 12).

[4] It is noted that the main contention of the respondents raised in encl 12 is that the issue arising (from AK contract) in this application for judicial review was purely a contractual dispute and not a breach of the respondents' public duty or function and shall be dealt with according to the provisions of the contract implying that such issue in contractual dispute is not amendable by way of judicial review.

BACKGROUND FACTS

[5] The applicant was at all material times and is a company incorporated under the Companies Act 1965 in Malaysia and having its business office at 2nd Floor, Lot 23, Block D, Lintas Square, Jalan Lintas, 88300 Kota Kinabalu, Sabah, Malaysia.

[6] The applicant is the licensed bumiputra contractor registered with contractor license issued by Lembaga Pembangunan Industri Pembinaan Malaysia (CIDB) in Class G7 and with Pusat Pendaftaran Kontraktor Kerja Bekalan/Perkhidmatan Dan Juruperunding Kementarian Kewangan Sabah (PUKONSA) in Class A.

See exh 'AK2' at pp 38–43 of encl 2.

[7] The first respondent as the State Government of Sabah awarded the contract for the works described as 'Penyelenggaraan Jalanraya-Jalanraya Majlis-Majlis Perbandaran dan Daerah di Kawasan Timur Sabah' ('the works') in Contract No HQ.7/2020(S) ('AK contract') to the applicant pursuant to the letter of award dated 24 January 2020 issued by the second respondent as the authorized officer acting for and on behalf of the first respondent.

See exh 'AK3' at pp 44–250 of encl 2 consisting of:

(a) letter of award (AK3A) at pp 44–49;

(b) schedule of rates (AK3B) at pp 50–185; and

(c) conditions of contract (AK3C) at pp 186–250.

[8] The scope of works under AK contract includes the routine maintenance works and the upgrading works for the roads under the jurisdiction of the Local Authority and management of the District Council and Municipal Council at the East Coast Region of Sabah ('the relevant Councils'). A

[9] Pursuant to the letter of award, the applicant had taken possession of site on 7 February 2020 and had commenced the works under AK contract. B

APPLICANT'S AVERMENT

[10] Since January 2021 onwards, the first respondent had wrongfully and continuously applied the following highhanded tactics and taken unreasonable steps to pressure the applicant to give up AK contract which the first respondent did not succeed in doing so: C

(a) by the letter dated 7 January 2021, the second respondent informed the applicant that due to reduction of government funding by 75% for the implementation of the works in 2021, the second respondent proposed to the applicant to consider the option of mutual termination of AK contract. The applicant did not accept the option of mutual termination as suggested (see exh 'AK6' at pp 275–280 of encl 2); D E

(b) by another letter dated 28 May 2021, the second respondent informed the applicant that the first respondent had decided to reduce the scope of work under AK contract by omitting the routine maintenance works from AK contract effective from 1 June 2021. No genuine or bona fide reason was given by the respondents for the reduction of the scope of work under AK contract (see exh 'AK7' at pp 281–284 of encl 2); F

(c) despite the objection of the applicant, the respondents reduced the contract sum awarded under AK contract from RM325m to RM210,231,238.33 by omitting the routine maintenance works from the scope of work under AK contract (see exh 'AK-8' at pp 285–290 of encl 2); G

(d) on 28 May 2021, the District Engineers of the East Coast Region were informed by the second respondent that pursuant to the letter of award issued on 28 April 2021 by the Ministry of Finance Sabah ('MOF'), MOF had awarded the contract for the routine maintenance works omitted from AK contract to another contractor, Konsesi Pembinaan Kekal Mewah Sdn Bhd (see exh 'AK9' at pp 291–292 of encl 2); and H I

(e) on 28 February 2022, the second respondent informed the applicant in writing that the first respondent did not approve any allocation of fund for the works under AK contract for the financial year of 2022 (see exh 'AK10' at pp 293 of encl 2).

[11] At all material times prior to 5 April 2022, the applicant did not receive any warning or notice of material breach of contract from the respondents which would justify or otherwise threaten the termination of AK contract under cl 51 (or cl 52) of the conditions of contract.

[12] On 5 April 2022, the applicant received a letter dated 31 March 2022 issued by the second respondent informing the applicant that the first respondent had decided to terminate AK contract with effect from 1 May 2022 ('the said letter of termination') relying on cl 52.1 of the conditions of contract as the ground of termination ('the impugned decision').

See exh 'AK11' at pp 294–295 of encl 2.

[13] Clause 52.1(a) of the conditions of contract provides as follows:

> (a) Notwithstanding any provision of this Contract, the Government may terminate this Contract by giving not less than thirty (30) days written notice to the effect to the Contractor (without any obligation to give any reason thereof) if the Government considers that such termination is necessary for national interest, national policy or national security.

(See exh 'AK3' at pp 226 of encl 2.)

[14] It is noted that the right to termination based on cl 52.1(a) of the conditions of contract is the exercise of a contractual discretion by the first respondent if the first respondent considers it necessary to terminate AK contract on any of the three specific grounds, namely, national interest, national policy or national security.

[15] However, in the said letter of termination, the respondents did not indicate any specific relevant ground under cl 52.1(a) which the first respondent as the Government considered necessary to the termination of AK contract.

[16] A disturbing turn of event took place three months after the first respondent had terminated AK contract by the impugned decision in the said letter of termination issued on 31 March 2022 which was received by the applicant on 5 April 2022.

[17] On 30 June 2022, the applicant obtained a letter dated 24 June 2022 issued by the Ministry of Finance Sabah ('MOF') and first became aware on 30 June 2022 that the first respondent by MOF appointed another contractor Kenari Express Sdn Bhd to carry out the road maintenance works previously within AK contract at the ceiling costs of RM150m for a period of ten years

('KE contract') on 24 June 2022 which was three months after the impugned decision of the first respondent in terminating AK contract on 31 March 2022 allegedly on the ground of national interest, national policy or national security.

See exh 'AK12' at p 296 of encl 2, the said letter dated 24 June 2022 from MOF instructing the second respondent to appoint another contractor Kenari Express Sdn Bhd to carry out the road maintenance works under KE contract.

[18] By reason of the matter aforesaid, the applicant's averred that the ground of this application for judicial review first arose on 30 June 2022 when the applicant first became aware of the award of KE contract to another contractor approved on 24 June 2022 by MOF of the first respondent.

[19] The applicant therefore submit that this Application is within the time allowed under O 53 r 3(6) of the Rules of Court 2012 in either case, which is three months from the date:

(a) when the grounds of application first arose, which was on 30 June 2022 when the applicant became aware of the approval of the award of KE contract to another contractor Kenari Express Sdn Bhd; or

(b) when the impugned decision is first communicated to the applicant when the applicant received the said letter of termination from the respondents on 5 April 2022.

RESPONDENTS' AVERMENT

[20] It was submitted that the issue on the termination of the contract through the letter of termination by the second respondent is a contractual matter which falls under the domain of private law and not public law.

[21] The respondents did not act as a public authority exercising its authority over the applicant but rather, the respondents had acted according to the right afforded to them through the provisions of the contract, which include the right to terminate provided in cl 52 of the conditions of contract.

[22] Therefore, the respondents submits that the letter of termination is not susceptible to judicial review as the applicant is a private contracting party and the issue at hand is regarding contractual dispute and not breach of public duty. Consequently, the subject matter of the judicial review application is not a matter which comes under the supervision of this court for judicial review.

[23] The respondents further submit that in line with the principle of freedom of contract, the issue at hand is a contractual dispute and should be

ventilated through the usual writ and/or originating summons as provided in the Rules of Court 2012. It is a contractual dispute that should be dealt with within the four corners of the contract only and no further than that.

[24] The respondents also relied on s 29(1)(a) of the Government Proceedings Act 1956 (Act 359) ('the GPA') and s 54 of the Specific Relief Act 1950 ('the SRA') prohibit the grant of an injunction, whether interlocutory or permanent against the Government.

[25] It was contented that the Government Fund issue and appointment of other companies to undertake works in the contract is protected under the Official Secrets Act 1972.

THE DECISION OF THE COURT

Whether judicial review application is a proper mode to be filed in this proceeding

[26] The respondents submits that the relationship between the applicant and respondents was intended to be commercial and contractual, and this intention is evidenced by the issuance of the letter of award dated 24 January 2020 by the second respondent and subsequent acceptance of the letter of award by the applicant. The applicant had then proceeded to commence work under the contract and thereafter submitted its ten progress claims which the second respondent then approved through the issuance of the ten interim certificates as mentioned in para 17 of applicant's affidavit.

[27] It is argued that all actions by respondents were done per cll 24 and 52.1 of the conditions of contract as evidenced by the issuance of the variation order mentioned in para 12 of respondents' affidavit and subsequently the issuance of the letter of termination as mentioned in para 16 of the same.

[28] For ease of reference, cll 24 and 52.1 of the conditions of contract are reproduced below:

> 24.0 VARIATIONS
>
> 24.1 The S.O. may issue instructions requiring a Variation in a form of a Variation Order. No variation required by the S.O. shall vitiate this Contract. Upon the issuance of such Variation Order, the Contractor shall forthwith comply with the Variation Order issued by the S.O.
>
> 24.2 The term 'Variation' means a change in the Contract Document which necessitates the alteration or modification of the design, quality or quantity of the Works as described by or referred to therein and affects the Contract Sum, including:
>
> (a) the addition, omission or substitution of any work;

(b) the alteration of the kind or standard of any of the materials, goods to be used in the Works; or

(c) the removal from the Site of any work executed or materials or goods brought thereon by the Contractor for the purposes of the Works other than work, materials or goods which are not in accordance with this Contract.

24.3 Any variation made under this clause shall not relieve the Contractor from his obligations under clause 22.1(c).

52.0 TERMINATION ON NATIONAL INTERESTS

52.1 Termination

(a) Notwithstanding any provision of this Contract, the Government may terminate this Contract by giving not less than thirty (30) days written notice to that effect to the Contractor (without any obligation to give any reason thereof) if the Government considers that such termination is necessary for national interest, national policy or national security.

(b) For the purpose of this clause, what constitutes 'national interest', 'national policy' and 'national security', shall be solely made and determined by the Government and such determination shall for all intent and purposes be final and conclusive and shall not be open to any challenge whatsoever.

[29] It was thus submitted that the respondents did not act as a public authority exercising its authority over the applicant but rather, the respondents had acted according to the right afforded to them through the provisions of the contract, which include the right to terminate provided in cl 52 of the conditions of contract. In support, the respondents relied on two authorities in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 ('WRP Asia Pacific') and *Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd* [2015] 2 MLJ 509 ('Majlis Perbandaran Subang Jaya').

[30] It is to be noted that a challenge on the use of the appropriate procedure is very much fact based.

[31] In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 1 MLRA 524; [2010] 5 CLJ 865 ('Ahmad Jefri'), the Federal Court held:

[21] In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate). If his complaint is not amenable for judicial review then he can commence his action by writ or originating summons; there is no issue on the process. So first we have to determine the parameter of matters amenable for judicial review. It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. *To*

qualify there must be sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power (see para 61 Halsbury's Laws of England (4th Ed, 2001 Reissue) Vol 1(1).

[34] *From the persuasive authorities above, we observed that for the appellant to be amenable for judicial review there must be the presence of an element of public law necessary to attract remedies of administrative law ...*

[36] Thus, the decision to dismiss the appellant was made under a statutory law by a body who acted within the scope of such statutory power ... Here, a special statutory provision bearing directly upon the of a public authority to dismiss the appellant. This injects the element of public law necessary in this context to attract the remedies of administrative law making this case amenable for judicial review.

[61] *We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O53 of the RHC.* If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted ...

[32] Based on the above, it is clear that the test to determine the proper procedure to be adopted is to ascertain whether there is a public law element in the dispute. If the claim is based solely on public law, then it must be commenced by way of O 53 of the ROC. If it is a mixture of public and private law and the public law element is more predominant, it also must be commenced by way of O 53 of the ROC.

[33] Coming back to the facts in the present case, the first respondent was at all material times and is the State Government of Sabah having control and management of the second respondent and the Public Works Department, Sabah ('PWD') other than the Ministry of Local Government Sabah ('MLG') and Ministry of Finance Sabah ('MOF').

[34] The second respondent was at all material times and is the Director of the Public Works Department Sabah or PWD having the control and management of, inter alia, the construction, maintenance and supervision of public roads, bridges, government buildings and other development works and maintenance works assigned to it by the first respondent to be implemented in the State of Sabah.

[35] Further, the second respondent was at all material times and is the authorized public officer and/or employee and/or agent of the first respondent under the directives, management and control of the first respondent.

[36] It is in evidence that the scope of works under AK contract consisted of two parts, namely, the routine maintenance works and the upgrading works, for the roads under the jurisdiction of the Local Authority and management of the District Council and Municipal Council in the East Coast Region covering Sandakan, Beluran, Telupid/Tongod and Kinabatangan ('the relevant Councils').

[37] As emphasised by the Federal Court in *Ahmad Jefri* at p 156 (MLJ) para [21], 'it is necessary to examine both the source of the power and the nature of the decision made' to determine whether there is sufficient public law element in the impugned decision made.

[38] Learned counsel for the applicant thus draw this court's attention that the relevant Councils herein are established under s 3 of the Local Government Ordinance 1961 ('the Ordinance') with statutory powers, duties and functions which include the general control and care and the funding of the construction and maintenance of roads within the urban and rural areas for the interest, use and benefit of the public and the inhabitants under ss 38(1), 38(3), 43, 53 and 57(1) of the Ordinance.

[39] Sections 38(1) and (3) of the Ordinance provide that:

> (1) *The Authority shall have the general control and care of* all public playing grounds, parks and all other open public places, other than *roads and streets, and … for the use of the public or to which the inhabitant of the urban area shall at any time have or acquire a common right and the same shall be vested in such Authority in trust to keep the same open or control the use of the same for the benefit of the inhabitants …*
>
> (3) *An Authority may in any urban area make, construct, alter, repair* and, if necessary, temporarily close *any road, street, bridge, ferry, culvert and tunnel which has been declared by the Yang di-Pertua Negeri to be vested in such Authority or under its control and may make roads,* streets, bridges, ferries, culverts and tunnels *within the urban area.*

[40] Section 43 of the Ordinance provides that:

> In any part of the area of an Authority not within an urban area the Minister may declare that any road, track, bridge, ferry or culvert on or to be constructed therein *shall* be under the control of the Authority and upon such declaration being made the Authority may make alter divert or maintain any such road, track, bridge, ferry or culvert:

[41] Section 53 of the Ordinance provides that:

> Every Authority *shall* set up a Fund to be known as the Municipal Council Fund, the Town Fund or the District Council Fund preceded by the name of the Municipality, the Town or the District as the case may be (hereinafter referred to as 'the Fund').

[42] Section 57(1) of the Ordinance provides that:

> (1) Where any public road has been vested in an Authority under the provisions of subsection (3) of section 38 or subsection (3) of section 41 there may be paid annually to the Authority by the Government the following amounts, that is to say —
>
> (a) such proportion of the cost to the Authority of the construction, reconstruction or maintenance of roads vested in the Authority, as the Legislative Assembly by resolution may from time to time approve;
>
> (b) the reimbursement of all or any part of the cost of construction, reconstruction or maintenance of any road for which the Authority is not responsible but which the Authority shall with the prior approval of the Minister construct, reconstruct or maintain.

[43] It is therefore clear that by reason of ss 38(1), 38(3), 43, 53 and 57(1) of the Ordinance, the respondents have a statutory public duty and function to maintain the roads vested upon the Local Authority such as the relevant Councils and to provide funding for the same.

[44] This court attention was then drawn to art 109(b) of the Federal Constitution read together with the Tenth Schedule in Part II — State Road Grant under items 2, 4 and 5 thereof, the State Road Grant is payable by Federal Government to the first respondent as the State Government of Sabah for each financial year specifically for the maintenance of State roads or all public roads other than federal roads in the State of Sabah.

[45] Further, pursuant to art 69(1) of the Federal Constitution, art 12(1) of the Sabah State Constitution, s 3 of the Government Contracts Act 1949 and s 4 of the Government Proceedings Act 1956, the first respondent as the State Government of Sabah has a statutory power to make contracts and to withdraw money from the consolidated fund for the contracts entered into such as AK contract which was a contract made by the first respondent in exercising its statutory power in the discharge of its public duties and functions for public interest.

[46] These indeed injects the element of public law to attract the remedies under administrative law: see *Ahmad Jefri* at para [25] at p 158, para [34] at p 160 and para [61] at p 172.

[47] Learned counsel for the applicant submitted that on the exercise of contractual discretionary power in the performance of a public duty and function, in this case, under cl 52.(a) of the conditions of contract stating that 'the Government may terminate this Contract ... without any obligation to give any reason if the Government considers that such termination is necessary

for national interest, national policy or national security': (see exh 'AK3' at p 226 of encl 2), there is no such thing as an absolute or unfettered discretion and such discretion must be exercised reasonably, fairly and in good faith and not arbitrarily or oppressively with ulterior and improper purpose as pronounced by the Federal Court in *OSK & Partners Sdn v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179 (FC) and *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC) and Court of Appeal in *KAB Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal* [2019] 6 MLJ 752 (CA).

[48] Authorities have established that 'the powers given to the public bodies must be exercised in public interest and there is no logic or principle to treat the power of contract any differently': see the comprehensive review of the relevant authorities in the judgment of the learned judge Justice Noorin Badaruddin in *Dhaya Maju LTAT Sdn Bhd v Kerajaan Malaysia & Anor* [2021] MLJU 1149 ('Dhaya Maju LTAT') coming to the conclusion that contractual actions and decisions are amendable by judicial review in the following paragraphs:

> [57] The manner in which contracts on behalf of the Government are executed is prescribed in s 2 of the Government Contracts Act 1949 as follows:
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> > Contracts on behalf of the Government
> >
> > 2. All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.
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> [58] Premised on the provisions of the law above, it can safely be said that the decisions relating to the existing contract and the works which certainly involve public funds, were made pursuant to the statutory powers. Since the decisions relating to the existing contract and the works emanate from the statutory power and regulated by law it is of the considered view that the impugned decisions have sufficient public law element and is amenable to judicial review.
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> [59] A similar proposition advanced by the Attorney General herein was discussed in the case of *OSK & Partners Sdn v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179. In that case, the Committee of the Stock Exchange under the Kuala Lumpur Stock Exchange ('KLSE') had imposed a fine on the applicant under the Articles of Association of the KLSE. It is clear that the relationship between the Stock Exchange and the applicant and other members is strictly contractual and governed by the Articles of Association of the KLSE. The KLSE itself was a company incorporated under the Companies Act 1965 but however was regulated by the then Securities Industry Act 1973. Since the objects of the KLSE are commercial in nature and that the relationship between the Stock Exchange and applicant is strictly contractual, the High Court decided that the decision of the Committee is not amenable to judicial review. In disagreeing with the proposition and allowing the appeal for the motion of certiorari, Abdoolcader J in delivering the judgment of

A the Federal Court stated as follows:

> The undefined limits and the extension of the scope of the remedy of certiorari over recent years were reaffirmed by the Court of Appeal in that case (at p 448 per Megaw, LJ, pp 455–458 per Shaw, LJ, and pp 463–466 per Waller, LJ).
>
> B *A body statutorily vested with jurisdiction over persons who have entered into contractual relationships with it may be subject to prerogative orders though the occasion for the exercise of this jurisdiction may only accrue alter the contractual relationship is entered into. Ex parte Lain (12) would appear to suppeditate the key to opening the doors for the extension of the prerogative orders to bodies owing their*
> C *powers solely to contract provided their powers although contractual are infused with a public element, and there is also authority to the effect that a body legislatively recognised may be subject to such jurisdiction.* In *Reg v Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 WLR 1052 1060 the English Court of Appeal quashed by certiorari the revocation of a licence involving both a contractual element and the common law right to trade in a market, and we
> D would advert to the judgment of Scarman, LJ, (at p 1060) on the question of the element of public law present in that case and the fact that the contractual licence was available in accordance with the discretion conferred by a statute regulating the common law right. That case in holding that a body vested with jurisdiction over persons with whom it has entered into a contractual relationship is subject
> E to certiorari went on to decide that in those circumstances in exercising the contractual right it was under a duty to act judicially. *Reg (Doris) v Ministry of Health & Local Government and the Northern Ireland Health Services Board* [1954] NI 79 *decided that certiorari would lie to review decisions of the Dental Services Committee and of the Ministry's appeal committee notwithstanding that those bodies exercised a jurisdiction arising out of a contract between a practitioner*
> F *and the Health Services Board.* In *Reg v Wadley, Ex parte Burton* [1976] Qd R 28 2*95 where a turf club's functions were afforded legislative recognition, it was held (at p 295) that a domestic tribunal recognised by the legislature is subject to prohibition.* (Emphasis added.)

G [60] Learned counsel for the applicant submits that matters such as public interest and public order must be determined by the court using an objective standard. The case of *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307 is highlighted to support the contention. In that case, Gopal Sri Ram FCJ said:

> H [5] Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant
> I were prejudicial to public order.

[61] Further, according to the applicant's learned counsel, the same test should apply in determining such matters in a contractual contract. The English case of *Braganza v BP Shipping Ltd; The British Unity* [2015] UKSC 17 is cited in support. In that case, Lady Hale said:

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> [20] The decided cases reveal an understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context. But at the same time they have struggled to articulate precisely what the difference might be. In *Abu Dhabi National Tankeer Co v Product Star Shipping Ltd (The 'Product Star') [No 2]* [1993] 1 Lloyd's Rep 397, 404, alter contrasting the position in judicial review, Leggatt LJ explained that: 'The essential question is always whether the relevant power has been abused. Where A and B contract with each other to confer a discretion upon A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.'

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[62] The English Supreme Court case in *Braganza* was adopted by the Court of Appeal in *KAB Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal* [2019] 6 MLJ 752. Speaking through the judgment of His Lordship Vernon Ong JCA (as His Lordship then was), the Court of Appeal stated:

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> [28] *It can therefore be discerned that the UK Supreme Court in Braganza not only applied the settled administrative law review principles, but unequivocally applied administrative law principles to contractual review.* The UK Supreme Court recognised that it is common for contracts to confer powers of discretion, including decision, often upon one party to the contract; in most cases it is the dominant party. For instance, loan contracts invariably grant the lending financial institution the power to vary interest rates from time to time at their discretion. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision maker. If, however, there is a risk where one party has the power to make decisions which affect the rights of both parties to the contract, then that party has a clear conflict of interest. This particular conflict arises especially where there is a significant imbalance of power between the contracting parties. *Accordingly, the courts have sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given. In other words, context will shape the content of the implied term and the practice of contractual review*. (Emphasis added.)

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[63] Since the respondents themselves recognize that the impugned decisions concern the public interest and having elected to issue the termination notice on that basis, it is of the considered view that the determination of whether the termination clause has been exercised reasonably and in good faith by the respondents as public authority and in exercising their statutory function, in principle, is subject to judicial review.

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[64] The jurisprudence in other Commonwealth jurisdictions is highlighted to this court where decisions pertaining to contracts were held to be amenable to judicial review.

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[65] In England, the High Court in *Regina (Molinaro) v Kensington and Chelsea Royal London Borough Council* [2002] LGR 336 had held that:

> ... the fact that a local authority is exercising a statutory function ought to be

sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused. Nor do I see any logical reason why an abuse of power made pursuant to some policy should be treated differently to one made on a specific occasion.

[66] In that case, the dispute arose from a lease agreement between the local council and the applicant on the change of use of the land. One of the objections raised was that the matter pertained to a private law function of the local council. The objection was rejected. The learned judge, Elias J stated that powers given to public bodies must be exercised in public interest and that there is no logic or principle to treat the power of contract any differently. The learned judge stated in the following fashion:

67. But public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest and the public has an interest in ensuring that the powers are not abused. I see no reason in logic or principle why the power to contract should be treated differently to any other power. It is one that increasingly enables a public body very significantly to affect the lives of individuals, commercial organisations and their employees.

[67] The same learned judge further stated that there are numerous decisions where decisions relating to contract have been subject to judicial review:

68. *Moreover, there are a host of important cases where decisions relating to contracts have been subject to the principles of judicial review to prevent the power being unlawfully exercised.* In *Roberts v Hopwood* [1925] AC 578 for example, to which I have already made reference, the court held that certain contractual terms were unlawful. In *R v Lewisham London Borough Council, ex p Shell UK Ltd* [1988] 1 All ER 938 and *Wheeler and others v Leicester City Council* [1985] AC 1054; [1985] 83 LGR 725 *decisions of the councils involved not to contract with organisations to whom they were ideologically unsympathetic, were held to be unlawful. Similarly, there have been decisions which recognise that in appropriate circumstances the decision to terminate a contract might be subject to judicial review principles: see for example the Court of Appeal decision in R v Hertfordshire County Council, ex p National Union of Public Employees* [1985] IRLR 258 and, in the context of a lease, the decision of the House of Lords in *Wandsworth London Borough Council v Winder* [1985] AC 461; 83 LGR 143. (Emphasis added.)

[68] Elias J further opined as follows:

69. *In my opinion, the important question in these cases is the nature of the alleged complaint. If the allegation is of abuse of power the courts should, in general, hear the complaint. Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress. But sometimes the application of public law principles will cut across the private law relationship and, in these circumstances, the court may hold that the public law complaint cannot be advanced because it would undermine the applicable private law principles.* (Emphasis added.)

[69] The learned author SH Bailey in his article entitled 'Judicial Review of Contracting Decisions' [2007] PL 444 at p 463 supported the decision of Elias J in *Regina (Molinaro)* where he stated:

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> the approach articulated in Molinaro provides the clearest and most satisfactory framework for addressing the issues that arise where contracts are entered in the exercise of a statutory power.

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[70] The host of important cases where decisions relating to contracts have been subject to the principles of judicial review as found by the learned Judge Elias J in *Regina (Molinaro)* were usefully summarized in 'De Smith's Judicial Review' (8th Ed, 2018) at pp 150–151. At p 148, the learned authors opined as follows:

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> The tests applied by the courts to determine whether a function involving contract is susceptible to judicial review have been criticised as overly complex and liable to divert the attention of the court away from the substance of the complaint. In the orthodox approach, the court assumes that the fact that the source of public authority's power is statutory is in and of itself insufficient to make a dispute about a contract amenable to judicial review; the court therefore goes on to consider whether there is some additional 'sufficient public element, flavour or character' to the situation. A more straightforward approach (though not one widely applied by the courts) would be to say that if the contractual decision in issue involves that exercise of a statutory power, then in principle it should be subject to judicial review and the court should consider whether any of the grounds of review have been made out.

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[71] The learned authors at page 149 further discussed about identifying the 'additional public element' as follows:

> So long as the courts approach the issue of amenability by requiring a sufficient 'public element' in the contractual dispute, there is much to be said for adopting a pragmatic method and reasoning by analogy from previously decided cases rather than attempting to identify broad overarching principles (an exercise that soon risks imploding in a sea of generalisations). The cases set out in the following paragraphs demonstrate that different types of consideration are capable of providing the necessary 'public element-in some it is the intrinsic public importance of the contract-related decision; in others it is the ground of review ('bad faith' scoring more highly than irrationality, for example).

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[73] In India, the Supreme Court in *Sterling Computers Limited M&N Publications Limited* 1996 AIR 51 had decided that the court cannot review the merits of the contract. However, the court can examine the decision on the grounds of whether the decision-making process was reasonable or arbitrary in violation of article 14 (which translates into no person being above the law). In that case, NP Singh J stated:

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> By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the state. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, Chief Constable of the *North Wales Police v Evans*, the courts can certainly examine whether 'decision making process' was reasonable, rational not arbitrary and violate of Article 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of

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A the State and the public, then the court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of article 14 of the Constitution, the courts cannot ignore such action saying that the authorities B concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision.

[74] In *Kasturi Lal Lakshmi Reddy v State of Jammu and Kashmir and Anr* (1980) 3 SCR 1338, the Supreme Court had held that the decision to award a government C contract can be reviewed on the ground of arbitrariness and reasonableness and in the case of *State of Madhay Pradesh & Ors v Nandlal Jaiswal & Ors* [1987] 1 SCR 1, the same Court had held that mala fides and discrimination are grounds where a government contract can be reviewed.

[75] In *New Horizons Ltd v Union of India* 1995 SCC 1 478, the Court stated that D in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes because:

... The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and E requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion.

[76] In the same case Agrawal J further stated:

Moreover a contract would either involve expenditure from the State exchequer F or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or gaming other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private G individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognized that certain measure of 'free play in the joints' is necessary for an administrative body functioning in an administrative sphere.

H [77] In affirming that the requisite public element does exist in contractual matters, Verma J in *Kumari Shrilekha Vidyarthi v State of Uttar Pradesh* 1991 AIR 537 stated as follows:

Even assuming that it is necessary to impart the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, I *we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, alter the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.*

> *It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.* (Emphasis added.)

[78] In *Jagdish Mandal vs State of Orissa* [2006] 13 SCC 449, the Supreme Court held that the court must ask the following questions when reviewing the award of government contract:

> Therefore a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably in accordance with relevant law could have reached'.
>
> (ii) Whether public interest is affected.

[79] In *DFO v Ram Sanehi Singh* AIR 1973 SC 205, the Supreme Court is of the view that the fact that remedy can be obtained elsewhere is not a bar to judicial review. Shah J stated:

> *We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ.* In view of the judgment of this court in *KN Guruswamy*'s case *there can be no doubt that the petition was maintanble, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.* (Emphasis added.)

[80] It is pertinent to note that the Indian constitutional and administrative framework is similar to the Malaysian framework. The apex courts in both countries have recognized that the power of judicial review is the basic feature of the Federal Constitution (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (FC)). Further Item 1, Schedule, Courts of Judicature Act 1964 is substantially similar to article 226(1) of the Indian Constitution which states:

> 226(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including (writs in the nature of habeas corpus, mandamus, prohibition. quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose).

[81] The specific part providing for fundamental rights can be found in both the Indian Constitution (article 14) and the Federal Constitution of Malaysia.

...

[83] In Canada, since the early 1990s the courts have accepted that the procurement

process of government contracts is susceptible to judicial review. In *Thomas C Assaly Corp v Canada* [1990] 44 Admin LR 89 ...

...

[85] The jurisprudence in other Commonwealth countries alluded to in the above is in accord with the present matter because as stated earlier, the power of the Government to enter into contracts and the use of public funds from the Consolidated Funds are regulated by law and therefore injects sufficient public law elements into the matter. The requirement of public element exists in the Existing Contract and amenable to judicial review. Even if there is a need to identify an additional public law element in the same contract, this court agrees with the applicant's submission that this requirement is fulfilled.

[49] As pointed out by the learned counsel for the applicant, the facts and issues in *Dhaya Maju LTAT* are similar or substantially the same as this instant case involving the application for judicial review to quash the impugned decision of termination of the construction contracts by the Government for following prayers set out in para [2]:

[2] In this application, the applicant is seeking, inter alia, for the following reliefs:

(i) a declaration that the first impugned decision is invalid, null and void;

(ii) a declaration that the first and second respondents' decision to reopen the tender for the KVDT 2 (the 'second impugned decision') project is invalid, null and void;

(iii) an order of certiorari to quash the first and/or second impugned decision;

(iv) an order of mandamus to compel the first and/or second respondent or their agents to execute all documents and/or agreements and to carry out necessary action to give effect to the LOA including but not limited to executing a formal agreement envisaged under the said LOA (this relief was withdrawn later by the applicant);

(v) pending determination of the proceedings, the first impugned decision and/or second impugned decision be stayed pursuant to O 53 r 3(5) of the Rules of Court 2012 ('ROC 2012') and/or under the inherent jurisdiction of the court; and

(vi) general damages to be assessed.

[50] In *Dhaya Maju LTAT*, the applicant as the contractor applied to declare the termination of the contract was illegal, unlawful and void and that the Government had no basis to terminate the Klang Valley Double Railway Tracking (Phase 2) contract on ground of public interest. The High Court granted leave to the applicant to apply judicial review. Court of Appeal dismissed the Government's appeal against the order obtained by Dhaya Maju LTAT Sdn Bhd to commence judicial review (however, the Court of Appeal decision was not reported). Learned counsel for the applicant herein referred to

the report in the media where His Lordship Lee Swee Seng JCA delivered the unanimous decision of the Court of Appeal said that 'the termination of a construction contract is usually a private law matter, but in this case, there is a public element as the government said the termination was done on the ground of national interest.' On 2 August 2022, the government withdrew its appeal to the Federal Court as the parties have finalized their settlement: see Online News in Appendix A attached to the applicant's submission in reply encl 18.

[51] Applying the test laid down in *Ahmad Jefri* and the case of *Dhaya Maju LTAT*, this court of the view that the applicant's complaint or grievance is amenable for judicial review as the impugned decision arose from AK contract entered into between the first respondent as the public authority in the performance of its public duties and functions in exercising its statutory power and the applicant as the contractor being adversely affected by the impugned decision.

[52] With regard to the case of *WRP Asia Pacific* referred to by the respondents, it concerned the issue relating to the issuance of notice by Tenaga Nasional Bhd pursuant to s 38 of the Electricity Act 1990. The Federal Court found that the relationship of the parties therein was a private relationship and commerce-based and the wrongful tampering of electricity to be a breach of private land. Therefore, on the facts, *WRP Asia Pacific* can be distinguished. The Federal Court held at p 305 D-F as follows:

> [21] The Court of Appeal likewise was right in concluding that the facts came within a commercial or contractual environment. We are in total agreement with the factual finding of the Court of Appeal.
>
> [22] Factually we also hold the view that the letter and the two documents were sent out due to the wrongful tampering of the electricity meter on account of a breach of private law. In *Queen v Minister of Energy and Director General of Electricity Supply ex parte Robert Guildford* [1998] EWHC Admin 203*) the court had occasion to opine as regards the involvement of private law, thus:*
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> > The guidance given by the second respondent to electricity suppliers in this context is in my judgment entirely within the meaning properly to be given, in particular, to Schedule 7 para 11 of the Electricity Act 1989. Accordingly the primary declaration sought by the applicant must be refused.
> >
> > As to the standard of proof, I see no reason to dissent from the test accepted by the Court in the case of Smith and propounded by the Northern Ireland Courts in the case of *Sherlock*. *Tampering with an electricity meter falls to be treated as a breach of private law,* as well as a criminal offence. (Emphasis added.)

[53] In *Dhaya Maju LTAT*, the learned judge referred to and distinguished *WRP Asia Pacific* case where Federal Court 'recognised that the notice issued by Tenaga Nasional Bhd therein could be reviewed if question on procedural impropriety was raised' and said at para [93] as follows:

A [93] It is imperative to note that the Federal Court in that case had implicitly recognized that the notice issued by Tenaga Nasional Bhd therein could be reviewed if question on procedural impropriety was raised. Suriyadi FCJ (as he then was) in delivering the judgment of the Court stated as follows:

B > [24] Perusing the appellant's submission we failed to find any complaints on the procedural exercise undertaken by the respondent which led to the issuance of the documents (*Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141) ...

C **[54]** The respondents further relied on the case of *Majlis Perbandaran Subang Jaya* where Hamid Sultan JCA in his judgment held at para [15](g):

> (g) for the respondent to succeed by way of judicial review, it must demonstrate, inter alia, at least one of the following: (i) it violates the fundamental rights of the citizen; (ii) breach of constitutional provision; (iii) breach of statutory provision;
D and (iv) arbitrary exercise of power to the detriment of public, etc. Mere contractual disadvantage is not enough; and

E **[55]** Again, on the challenge of contractual actions and decisions, the learned judge in *Dhaya Maju LTAT* referred to the judgment of the Court of Appeal in *Majlis Perbandaran Subang Jaya* and said at para [89] as follows:

> [89] Likewise, in the case of *Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd*, the Court of Appeal had clearly held that contractual actions can be challenged if it is in violation of the Federal Constitution or law or public policy or colourable
F arbitrary of power which will cause or had caused loss to the public as well as to the state. The Court of Appeal stated:

> > Government and/or related agencies' decision on administrative action can be a matter of challenge by the process of judicial review and not one relating to contracts, unless it is in violation of the Federal Constitution or law or public
G policy or colourable arbitrary exercise of power which will cause or had caused loss to the public as well as to the state exchequer, etc.

H **[56]** The respondent also relied on s 29 of the Government Proceedings Act 1956 (Act 359) ('the GPA 1956') and s 54 of the Specific Relief Act 1950 ('the SRA 1950') as having the effect of expressly and effectively limiting the court's jurisdiction in the granting of an injunction against the respondents. However, s 29(1)(a) of the GPA 1956 provides that 'the court shall not grant an injunction or make an order for specific performance, *but in lieu thereof make an order declaratory of the rights of the parties*'. In the applicant's application for
I judicial review, the applicant applied for a declaration and an order of certiorari in prayers (1) and (2) of encl 10, which does not contravene s 29 of the GPA 1956 or s 54 of the SRA 1950.

[57] The respondents asserted that the documents and information disclosed therein (exhs 'AK9' and 'AK12') in support of the grounds of the applicant's application for judicial review are official secrets which, according to the respondents, are subject to ss 2 and 8(2) of the Official Secrets Act 1972.

[58] However, this court agrees with the learned counsel for the applicant that mere assertion of confidentiality and that affairs of state were involved without evidence in support could not shut out relevant evidence: as per judgment in *Mohamad Alhamdu bin Zainuddin v ACP Khaw Kok Chin (Chairman, Disciplinary Board Briged Utara Pasukan Gerakan Am, PDRM, Ulu Kinta, Perak) & Ors* [2017] 10 MLJ 161 held at para [34]:

> [34] I refer to the Official Secrets Act 1972 (Act 88), s 2 defines that official secret means any document specified in the Schedule and any information and material relating thereto and includes of any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by the Minster, the Menteri Besar or Chief Minister of a State or such public officer appointed under s 2B.
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> I refer to the affidavit of the first respondent at para 23.2 (encl 11) which affirmed that the minutes are confidential (sulit) and cannot be produced nothing more. I would expect if at all it is true then the first respondent has to show whether the said minutes has been classified as confidential when the same is not so in the present case. The SFC echoed the affirmation by the first respondent without giving any authority in support and *I am of the opinion that mere assertion of confidentiality without evidence in support, could not shut out relevant evidence*. I agree with the submission by learned counsel that there are plethora of cases as stated in para 38 of her submission where the minutes of proceedings in a disciplinary proceedings were produced and served to the other applicants. I refer to the case referred by learned counsel *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 where Mohamed Zahir FCJ said:
>
> > (2) a mere assertion of confidentiality and that affairs of state were involved without evidence in support, could not shut out relevant evidence;

[59] The respondents' complaint was that the two letters in exhs 'AK9' and 'AK12' are scheduled documents under Official Secrets Act 1972 and classified as official secret which cannot be divulged to the public. The Official Secrets Act 1972 deals with the prevention of unauthorised disclosure of official secrets and created offences for any such infringement.

[60] The term 'official secrets' as defined by s 2 of the Act 88 as follows: 'official secret' means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed

A under s 2B.

[61] The documents specified in the Schedule are: 'Cabinet documents, records of decisions and deliberations including those of Cabinet committees; State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees; Documents concerning national security, defence and international relations'.

[62] The applicant in the present case had rightly pointed out that exh 'AK9' is an administrative letter dated 28 May 2021 issued by the Director of Public Works Department (JKR) to the District Engineers of JKR informing them that the letter of award had been issued to Konsesi Pembinaan Kekal Mewah Sdn Bhd by Ministry of Finance Sabah and the Director of JKR was appointed as Project Director.

[63] Similarly, exh 'AK12' is an administrative letter dated 24 June 2022 from the Permanent Secretary of Ministry of Finance Sabah to the Director of Department of Public Works (JKR) informing that approval is given to JKR to appoint Kenari Express Sdn Bhd as the contractor.

[64] Neither the letter in exh 'AK9' nor the letter in exh 'AK12' is a scheduled document specified in the Schedule under s 2 of the Official Secrets Act 1972 since exh 'AK9' or exh 'AK12' are not 'cabinet documents, records of decisions and deliberations including those of Cabinet committees; or State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees; or documents concerning national security, defence and international relations'.

[65] Thus, there is no basis for the respondents to rely on the Official Secrets Act 1972. The respondents failed to substantiate the assertion that the report is 'sulit' or an official secret by stating the nature of injury that may be caused to the public interest by its disclosure.

[66] With regards to the issue of appointment of subcontractors restricted under cl 47.2 of the conditions of contract which goes to the merit of the contract, I am with the appellant that that judicial review concerns with the decision-making process on permitted established grounds and the merit of the contract is not within the scope of judicial review.

[67] It has been established that the first respondent had entered into AK contract pursuant to statutory power of the first respondent for the performance the statutory duties and functions of the first respondent to maintain and upgrade State roads in the State of Sabah including the East Coast Region in respect of AK contract under the relevant Councils as the local

authorities. By necessary implication, the first respondent was given the statutory power to make contract which will include the corresponding statutory power to terminate contract lawfully.

[68] Therefore, that the impugned decision of the first respondent in terminating AK contract is a decision made by the first respondent in the course of the performance of the first respondent's public duties and functions in exercising its statutory power.

[69] In this application for judicial review, the applicant being the party adversely affected by the impugned decision of the first respondent being a public authority is entitled to make this application. Thus, the impugned decision is amendable to judicial review. Order 53 r 2(4) of the Rules of Court 2012 provides:

> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Relevant grounds for judicial review

[70] Ambit of judicial review was summarized by Court of Appeal in *Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri* [2018] 3 MLJ 14 (CA) in the judgment delivered by Zalleha Yusof JCA as follows:

> [7] Before we deal with the issue, we would like to emphasise that being a judicial review matter, our function here is to examine the conduct of the authority to ensure that it has acted within the scope of its lawful power. Hence, the issue here is whether the impugned order made under sub-s 7(1) of Act 301 suffers from illegality, irrationality, procedural impropriety and unreasonableness.
>
> [18] It cannot be disputed that sub-s 7(1) of Act 301 gives absolute discretion to the Minister to make such order as the impugned order. See *Arumugam a/l Kalimuthu*. However, it also cannot be disputed that such discretion must also have legal limits to avoid it being abused. This principle had been emphasised by the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148, and have been quoted by many other decisions thereafter:
>
> > Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression ...
>
> [19] We must also bear in mind, that it is the appellant's contention that his fundamental rights under the Federal Constitution have been infringed. The recent trend in judicial review as decided by our apex court is that the test used had advanced from the subjective to that of the objective test, if state action affects

fundamental right, the court will not only look into procedural fairness but also substantive fairness. See: *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765. Hence in this instance, this Court is entitled to look not only at the procedural aspects but also at the substance or merits of decision made by the Minister. It is therefore not wrong for this court to enquire as to the reasonableness or fairness of the Minister's decision.

[41] In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665, it was held, inter alia, by this court:

> 14. The Minister may not be procedurally compelled to furnish his reasons. But if he gives no reasons or inadequate reason, then it is open for a Court to conclude that he had no good reasons or inadequate reasons for making the decision he did. The reasons he gives are, of course, subject to curial scrutiny for the purpose of determining whether he had exercised his discretion in accordance with law.

Illegality — Impugned decision under cl 52.1(A) contrary to law

[71] It is the applicant contention that the impugned decision of the first respondent in terminating AK contract was contrary to law, in breach of natural justice, irrational and unreasonable and was made in bad faith with ulterior motive and improper purpose purportedly on the ground of national interest, national policy or national security as alleged by the first respondent.

[72] The applicant had lay down the history of the maintenance and upgrading works of all the District Council and Municipal Council roads for the entire State of Sabah that was undertaken by a contractor Pembinaan Kekal Mewah Sdn Bhd including the scope of work under AK contract for the East Coast Region ('PKM contract') since 1997 or thereabout until 2019 and that throughout the entire contract period under PKM contract for more than 22 years, there was no threat or ground for termination by reason of national interest, national policy or national security in respect of PKM contract.

[73] Sometime in late 2019, the first respondent terminated PKM contract and awarded the scope of work comprised under PKM contract to four contractors in four packages including AK contract which was awarded on 24 January 2020.

[74] The applicant further submits that since the award of AK contract and in the course of implementation of AK contract from 7 February 2020, the first respondent did not allege and was completely silent on the ground of national interest, national policy or national security despite the following highhanded tactics and unreasonable steps taken by the first respondent to pressure the applicant to give up the works under AK contract:

(a) the first respondent had intimidated the applicant with the option for mutual termination of AK contract on 7 January 2021;

(b) the first respondent reduced the scope of work under AK contract in taking away the routine maintenance works from AK contract under protest by the applicant and thereafter awarded another contract for the said routine maintenance works to another contractor Pembinaan Kekal Mewah Sdn Bhd on 24 April 2021; and

(c) the first respondent informed the applicant of the non-approval of allocation of fund for AK contract by the first respondent for the financial year of 2022 on 28 February 2022.

[75] More significantly, the first respondent by MOF has awarded the upgrading works of the District Council and Municipal Council roads in the State of Sabah inclusive of the scope of work for the upgrading works under AK contract to another contractor Kenari Express Sdn Bhd in KE contract on 9 June 2022 merely three months after the first respondent had decided to terminate AK contract purportedly on the alleged ground of national interest, national policy or national security under cl 52.1(a) of the conditions of contract.

[76] It was submitted that by reason of the matter aforesaid, the subsequent award of KE contract to Kenari Express Sdn Bhd on 9 June 2022 which was awarded three months after the impugned decision of the first respondent in terminating AK contract on 31 March 2022 had completely negated, nullified, invalidated and rendered null and void the ground of national interest, national policy or national security under cl 52.1(a) as alleged in the said letter of termination purportedly as the ground of termination of AK contract.

[77] By reason of the matter aforesaid, I agree with the applicant the impugned decision of the first respondent to terminate AK contract was not necessary for national interest, national policy or national security under cl 52.1(a) of the conditions of contract and was in fact not based on consideration of national interest, national policy or security considerations.

[78] I am of the considered view that the impugned decision of the first respondent to terminate AK contract relying on cl 52.1(a) of the conditions of contract was wholly misconceived and wrong in law. The first respondent had acted in excess of its jurisdiction, and consequently, the impugned decision of the first respondent in terminating AK contract in its letter dated 31 March 2022 (exh 'AK11') was therefore invalid and null and void.

[79] Steve Shim CJ (Sabah and Sarawak) in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 (FC)

held as follows:

> ... The executive, by virtue of its responsibilities, has to be the sole judge of what the national security requires. However, although a court will not question the executive's decision as to what nationality security requires, *the court will nevertheless examine whether the executive's decision is in fact based on national security considerations.* Here, I would subscribe to the observation of Wee Chong Jin CJ (Singapore) in *Chng Suan Tze* when he said:
>
> > It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded. In such cases, the decision would be based on a consideration of what national security requires, and the authorities are unanimous in holding that what national security requires is to be left solely to those who are responsible for national security. *The Zamora* [1916] 2 AC 77 and *GCHQ* [1985] AC 374. However, in these cases, it has to be shown to the court that considerations of national security were involved. *Those responsible for national security are the sole judges of what action is necessary in the interest of national security, but does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security.* (Emphasis added.).

[80] Therefore, when the first respondent in the present case states that its action or decision is based on national security considerations, it must be willing to submit its action and decision to the scrutiny of the court. It is duty bound to produce objectively verifiable facts that can satisfy the court that it is in fact acting on the basis of national security considerations, which the first respondent had failed to do.

[81] It is pertinent to note, on one hand, the first respondent had by the impugned decision terminated AK contract on 31 March 2022 invoking the ground of national interest, national policy or national security under cl 52.1(a) of the conditions of contract while on the other hand, the first respondent awarded the works under AK contract on 24 June 2022 to another contractor three months after the impugned decision to terminate the same work. The subsequent award of KE contract by the first respondent to Kenari Express Sdn Bhd on 9 June 2022 which was three months after the impugned decision of the first respondent in terminating AK contract on 31 March 2022 had completely negated, nullified, invalidated and rendered null and void the ground of national interest, national policy or national security as alleged in the said letter of termination as the ground of termination of AK contract.

[82] Thus, I am in agreement with the submissions of the learned counsel for the applicant that the first respondent had acted unconstitutionally contrary to art 8 of the Federal Constitution in having wrongfully applied discriminatory treatment against the applicant in making the impugned decision which was unconstitutional and unlawful and was therefore invalid

and void. The need to observe and respect the doctrine of equality before the law and the entitlement of all to the equal protection of the law cannot be overstated under art 8 of the Federal Constitution. See: *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; [2014] 6 CLJ 541; [2014] 1 LNS 746 (FC); *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243 at p 246; [1982] 1 LNS 1 (SC); *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307; [2010] 1 CLJ 300.

[83] The appellant further submit that by reason of MOF's approval to re-award KE contract on 9 June 2022 (including the work under AK contract) to another contractor Kenari Express Sdn Bhd three months after the impugned decision of the first respondent in terminating AK contract on ground of national interest, national policy or national security, the impugned decision of the first respondent was irrational, manifestly unreasonable, capricious and arbitrary in that no responsible government or public authority appraised of the material facts acting reasonably or sensibly would have made in similar circumstances.

[84] Therefore, it is wholly irrational and manifestly unreasonable on the part of the first respondent to rely on the alleged ground of national interest, national policy or national security under cl 52.1(a) to terminate AK contract in the circumstances aforesaid.

Breach of natural justice and procedural impropriety

[85] Learned counsel for the applicant further submits that by reason of the invalid ground of termination under cl 52.1(a), the only other relevant clause provided in the conditions of contract for termination of contract was cl 51 of the conditions of contract (see exh 'AK3C') However, the impugned decision of the first respondent to terminate AK contract was not in accordance with the requirements and provisions stipulated under cl 51 of the conditions of contract and was wrongful and contrary to law if, which is denied, the impugned decision was made pursuant to cl 51.

[86] In any event, in the impugned decision, the first respondent did not rely on cl 51 of the conditions of contract to terminate AK contract. Therefore, cl 51 of the conditions of contract was not relevant or applicable to the impugned decision in terminating AK contract.

[87] In the absence of any applicable ground of termination justifying the impugned decision of the first respondent in terminating AK contract, there was a breach of natural justice and procedural impropriety on the part of the first respondent in that the first respondent had failed to give the applicant an

opportunity to be heard on the actual ground of termination and had failed to provide any reason of termination of AK contract in accordance with law under the conditions of contract.

[88] There was no reason or inadequate reason for the first respondent to make the impugned decision to terminate AK contract in that the first respondent had wrongfully exercised its contractual discretion under cl 52.1(a) at the first respondent's 'uninhibited whim and fancy': as per judgment of Court of Appeal in *KAB Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal* [2019] 6 MLJ 752 (CA) in para [29].

[89] Court of Appeal in *Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri* [2018] 3 MLJ 14 (CA) in para [41] referred to the judgment of Gopal Sri Ram JCA (as he then was) in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665 stating, inter alia:

> 14. The Minister may not be procedurally compelled to furnish his reasons. But if he gives no reasons or inadequate reason, then it is open for a Court to conclude that he had no good reasons or inadequate reasons for making the decision he did. The reasons he gives are, of course, subject to curial scrutiny for the purpose of determining whether he had exercised his discretion in accordance with law.

[90] Simply put the court will not accept a bald assertion by the first respondent that it is acting in the interests of national security without any objective evidence showing that the first respondent's actions are in fact in the interests of national security and are not unreasonable and are proportionate to a legitimate statutory or administrative objective.

[91] I am therefore not persuaded that the first respondent's actions are in fact of national interest, national policy or national security under cl 52.1(a) to terminate AK contract as there is no evidence to suggest that it relates to national interest, national security or security related.

[92] It follows that the first respondent had acted in conflict with public policy and contrary to public interest in that the action of the first respondent in terminating AK contract in the circumstances aforesaid is contrary to justice and such action offends the most basic and explicit principles of justice and fairness and is injurious to the public interest and public policy.

[93] Principles governing the exercise of contractual discretion by public authority were comprehensively reviewed by Court of Appeal in *KAB Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal* involving the absolute contractual discretion of the respondent to impose administration fee

under the House Rules which the appellant protested being unreasonable. In the judgment of Court of Appeal, Vernon Ong JCA held:

> [23] At common law, the principles relating to the exercise of discretionary powers in public law, in particular, administrative law are well settled. The foundation of the public law duty to exercise discretionary power in a reasonable manner was laid down in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). In Malaysia, the courts have the power of judicial review and supervision of administrative actions and control over the exercise of discretionary powers. The decisions of an inferior court, administrative tribunal or other public authority may be reviewed on the grounds of procedural impropriety, illegality, irrationality and possibly proportionality which permits the courts to scrutinise the decision not only for process but also for substance (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC)). *In essence, the general rule is that there is no such thing as an absolute or unfettered discretion; a discretion must be exercised reasonably* (*Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135).
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> [24] Is the requirement of reasonableness applicable in the realm of private law; as in this case where the defendant appears to have the absolute discretion to fix the amount of the administrative fee. The answer to this question may be found in the common law. The application of the common law principles to the exercise of a contractual discretion arose in the seminal case of *CVG Siderurgicia del Orinoco SA v London SS Owners' Mutual Insurance Association Ltd, The Vainqueur José* [1979] 1 Lloyd Rep 557. It involved a claim to indemnity under the rules of the P and I club of which the plaintiff was a member. Rule 8(k) provided that: 'A member shall at the discretion of the Committee, be liable to have a deduction made from any claim where the Committee shall be of opinion that the Member has not taken such steps to protect his interests as he would have done if the ship had not been entered in this class. This deduction shall be of such an amount as the Committee in its discretion shall decide'. (Emphasis added.) Mocatta J held that *whenever a discretion is afforded to a party by contract it is an implied term that it must not be exercised unreasonably. The common law principles applicable to the exercise of a contractual discretion include fairness, reasonableness, bona fides and absence of misdirection in law.*
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> ...
>
> [29] We now return to the present case *where the central issue relates to the principles which govern the exercise of contractual discretion by the defendant. In our considered view, the conferring of a contractual discretion on the defendant does not subject the plaintiffs to the defendant's uninhibited whim and fancy. The authorities show that not only must the discretion be exercised honestly and in good faith, but having regard to the provisions of the SPA and the House Rules, it must be not be exercised arbitrarily, capriciously or unreasonably. The authorities are also clear that such a limitation applies as a matter of necessary implication. The rationale for such a limitation is that it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion. At first blush, the requirement of honesty and good faith seems quite clear. The decision-maker invested with the discretion must properly direct itself to the task in hand and should not exercise the discretion for an ulterior motive. The*

requirement not to exercise the discretion unreasonably is not analogous to a duty to take reasonable care but to Wednesbury reasonableness.

[94] I thus conclude that the exercise of the first respondent's discretionary power pursuant to the aforementioned cl 52.1(a) must be exercised subject to Wednesbury reasonableness. Consequently, the unreasonableness involved must be proven to be of a high degree of objective outrageousness.

CONCLUSION

[95] In a nutshell, the AK contract was made by the respondents in the discharge of their public duties and functions as the public authorities and by having wrongfully and unlawfully terminated AK contract on the basis of national interest, national policy or national security under cl 52.1(a), the impugned decision in terminating AK contract is amendable to judicial review.

[96] Having scrutinised the evidence adduced and the submissions of both the applicant and the respondents, I am not persuaded that the first respondent's actions are in fact of national interest, national policy or national security under cl 52.1(a) to terminate AK contract as there is no evidence to suggest that it relates to national interest, national security or security related.

[97] Hence, the impugned decision of the first respondent in terminating AK contract was contrary to law in excess of its jurisdiction, in breach of the principles of natural justice, irrational and manifestly unreasonable and was made in bad faith with ulterior motive and improper purpose and therefore was unlawful, invalid and null and void.

[98] Accordingly, order in term granted to the applicant's prayers (1), (2) and (3) as set out in the notice of hearing dated 9 August 2022 in encl 10.

Application for judicial review allowed.

Reported by Ashok Kumar